IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.1347 OF 1998

IN

SUIT NO.182 OF 1986

...

1. B.C.Mody Export Pvt.Ltd.
2. Balkrishna Chandulal Mody ...Appellants

(Original Defendants)

v/s.

Bank of India ...Respondent

(Original Plaintiff)

...

Ms.J.N. Pandhi for the Appellants.

None for the Respondent.

CORAM: D.K.DESHMUKH &

J.H.BHATIA **, JJ.**

DATED: 19TH JULY, 2007

JUDGMENT: (PER D.K.DESHMUKH, J.)

1. This Appeal is filed under Clause 15 of the Letters Patent. It is directed against judgment dated 29-04-1997 delivered by the learned single Judge of this court in Suit No.182 of 1996.

2. The facts which are relevant and material for deciding this Appeal are as under:-

. Suit No.182 of 1986 was filed by the Bank of India. The present Appellant No.1 was Defendant No.1 in that suit, and the present Appellant No.2 was the Defendant No.2. (For the sake of convenience, in this judgment the parties shall be referred to by their designation in the Suit.)

. Thus, the present Appeal has been filed by Defendants Nos. 1 & 2 in the suit. The

Plaintiff/bank had filed the suit for recovery of Rs.25,68,467.90 with interest at the rate of 19.50% p.a. with quarterly rest from the date of the suit till the date of realisation. The first Defendant, a limited company, is the principal borrower. The second Defendant is the Director of the first Defendant and is also a guarantor. Both the Defendants, according to the Plaintiff, are liable as principal debtor and guarantor. The Plaintiff claims that pursuant to the request made by the Defendant No.1 in or about 1978 the Plaintiff granted a letter of credit facility up to the limit of Rs.70 lakh for the purpose of the business of the first Defendant. According to the Plaintiff, the Defendants executed necessary documents when the said facility was granted.

. The suit claim relates to the transaction of the year 1978-79. The case proceeds that the 1st Defendant opened a letter of credit with the Plaintiffs in the year 1978 i.e. 26-9-1978 for Singapore $ 3,28,000. The said letter of credit was valid upto 15-4-1979. The 1st Defendant executed in favour of the Plaintiffs a letter of lien and set off dated 3-3-1978 and the 2nd Defendant had executed in

favour of the Plaintiffs and delivered to the Plaintiff a guarantee dated 3-3-1978 guaranteeing the payment of amounts due and payable by the 1st Defendant to the Plaintiffs under the aforesaid letter of credit.

. The Plaintiffs proceed to state that under the said letter of credit facilities the 1st Defendant as stated earlier made application on 26-9-1978 for the establishment of Irrevocable Letter of Credit in favour of International Mercantile Company Pvt.Ltd., Singapore in the sum of Singapore $ 3,28,000 being the price of certain goods which the 1st Defendant intended to import from the said beneficiary. The original application presented by the 1st Defendant for the said purpose has been produced before the Court. The Plaintiffs as per request opened their irrevocable letter of credit being No..1/72/SG/7 dated 27-9-1978 in favour of said beneficiary for the said amount.

. Under the said letter of credit three consignments of the goods were shipped by the said beneficiary M/s.International Mercantile Co.Pvt. Ltd. Singapore and documents in respect thereof were presented for

negotiations by said beneficiary to the branch of the Plaintiff at Singapore. This was done on 9-4-1979 which according to the Plaintiff was within the validity period of the said letter of credit which was upto 15-4-1979. This aspect has been disputed by the Defendants.

. The Singapore branch of the Plaintiff debited the amount in respect of three consignments as mentioned in bills of exchange respectively for Singapore $ of 1,21,625.22, 1,01,400.32 and 1,05,773.91. The said bills of exchange were drawn by the said supplier of the 1st Defendant in favour of the Plaintiff.

. Somewhere in the year 1979 the consignments arrived in this country. The Plaintiff duly presented the said documents to the 1st Defendant received under the letter of credit calling upon the Defendant to arrange for the funds which Defendants were bound and liable under the terms of the said letter of credit. However, the Plaintiff states that despite the due presentation of the said document, the 1st Defendant failed and neglected to provide sufficient funds to enable the Plaintiff to make payment of the said documents under the letter of

Credit. As Plaintiff was bound and liable under the letter of credit to make payment of the amounts of three consignments to said supplier M/s.International Mercantile Co.Pvt.Ltd. Singapore. The payments were made.

. The case further proceeds that out of three consignments the 1st Defendant arranged to pay the amount. In respect of the bill of exchange which was for Singapore $ 1,21,625.22 and upon such payment the goods received under the said Bill of Exchange were cleared and taken delivery by the 1st Defendant.

. However, the Defendant did not arrange the payment of other two bills and it may be stated at the outset that the suit claim relates to the non-payment of the said bills. The Plaintiff states that after much correspondence and long delay the 1st Defendant arranged to pay the amount of Singapore $ 15,773.91 in respect of one bill of exchange only. They however, did not pay interest for the delayed payment. As far as the amount of Singapore $ 1,01,400.32 covered by the other bill of exchange was not at all paid by the Defendant nor did the Defendant take steps to pay the required customs duty

thereon and clear the goods. The amount as claimed in the suit as stated earlier relates to the said claim.

. To be precise the suit claim relates to the entire amount including interest in respect of one bill of exchange of Singapore $ 1,01,400.32 which is produced as Exh.C collectively before the learned single Judge and interest amount on the consignments covering Singapore $ 1,05,773.91.

. According to the Plaintiff under the terms of letter of credit the 1st Defendant as the Principal borrower was bound and liable to pay the amounts under Bill of exchange when duly presented for payment within the reasonable time of presentation. However, they failed and neglected to do so. It was the duty and liability of the 1st Defendant as provided under the terms of Letter of Credit to pay all the incidental charges including the customs duty upon the imported cargo under the said bills of exchange. However, the Defendants failed and neglected to do so., despite repeatedly being called upon to do so. It may be stated that eventually one consignment covering bill of exchange produced as

Exh.C collectively for Singapore $ 1,01,400.32 was not at all paid by the Defendants nor the Defendants arranged to pay the customs duty thereon and consequently the customs authorities proceeded to auction the same for realisation of their duties such as customs duty, demurrage etc.

3. The suit was resisted by the Defendants. They denied their entire liability. Both the sides produced large number of documents. The court framed as many as seventeen issues. The court ultimately held in favour of the Plaintiff and passed a decree in favour of the Plaintiff and against the Defendants directing the Defendants to pay an amount of Rs.25,68,467.90 with further interest at the rate of 19.50% per annum from the date of suit till the date of realisation. The Defendants were also directed to pay costs of the suit.

4. In the present Appeal, at the hearing, three submissions were made before us. First submission is that the learned single Judge has held that the suit claim is not barred by the law of limitation, because the suit claim is filed within the period oflimitation from the date of acknowledgement of

liability by first Defendant. It is claimed that the liability has not been acknowledged by Defendant No.2, who is the guarantor and therefore, the suit as against the Defendant No.2 at least is barred by the law of limitation. Relying on the provisions of Section 129 of the Contract Act, it was contended that the guarantee given by the second Defendant cannot be termed as a continuing guarantee and therefore for that reason also the suit as against the second Defendant cannot be said to be within the period of limitation.

. The second submission advanced on behalf of the Defendants is that the learned single Judge committed an error in recording a finding against the Defendants on issue No.15. It was submitted that the learned single Judge has committed an error in holding that the Defendants had appointed their own clearing agent and therefore, it was the duty of the Defendants to take care of the goods while they were in the Custom’s godown. According to the learned Counsel the responsibility to handle the goods and to take care of the goods while they where in the godown of the custom department was that of the clearing agent of the Plaintiff and therefore, it was the duty

of the Plaintiff to exercise due care like taking insurance policy of the goods, and it is because of the failure of the Plaintiff to take due care that the loss was caused to the Defendants.

. The last submission was that the learned single Judge has committed an error in awarding interest at the rate of 19.50% on the entire amount. It is submitted that the interest at the rate of 19.50% p.a. could not have been levied because even the Plaintiff-bank was claiming interest at the rate of 15% p.a. None appeared for the Plaintiff.

5. So far as the first submission made by the learned Counsel is concerned, in our opinion, it is devoid of any substance. Perusal of the judgment of the learned single Judge shows that the learned single Judge has in verbatim quoted the letter dated 7th March, 1983 written by Defendant No.1, which was signed by Defendant No.2, wherein there is clear admission of liability. The suit has been filed on 14-1-1986 i.e. within three years from 7th March, 1983. The learned single Judge has also referred to and relied on another letter dated 6th September, 1984. It is also written by Defendant No.2 on behalf

of the Defendant No.1. The learned single Judge has observed that both the letters dated 7th March, 1983 and the letter dated 6th September, 1984 are signed by Defendant No.2. It is Defendant No.2, who has appeared as a witness on behalf of both the Defendants and in his evidence he has not disputed or denied that he wrote the letters. The Defendant No.2, as observed above, is the Director of Defendant No.1. It is further to be seen that in the agreement of guarantee executed by Defendant No.2 in favour of the Bank, it is clearly stated that guarantee is a continuing guarantee and it shall not be determined except at the expiration of three calender months written notice given to the Bank by Defendant No.2 of his intention to terminate the guarantee. It is further pertinent to be noted that from the judgment of the learned single Judge it does not appear that it was even contended before the learned single Judge that though the suit as against the Defendant No.1 is within limitation from the date of written agreement, as against the Defendant No.2 it is barred by law of limitation. This contention has been first time raised in this Appeal. In our opinion, considering that the second Defendant has himself signed the letter of acknowledgement and it is he who has been

representing the Defendant No.1 even in the court and it is he who has given evidence on behalf of the Defendant No.1, Defendant No.2 can not claim that he has not acknowledged the liability.

6. So far as second submission made by the learned Counsel appearing for the Defendants is concerned, issue No.15 reads as under:-

"Whether the defendants prove that the Plaintiffs by their negligence, default and breach of duties as alleged lost the security held by them?

The learned single Judge has recorded a finding that the Defendants have not proved this issue. The learned single Judge in paragraph 51 of the judgment has held that the Defendants had admitted before him that it was their duty to pay the customs duty on the consignment and clear the goods. The goods were not cleared by the customs authority, because the custom duty was not paid and because of failure to pay the custom duty a part of the consignment was sold by the Custom Authority to recover the custom duty. The learned single Judge has also in paragraph 30 observed that the Defendants were denying that they

had appointed M/s.P.G.Modak & Sons as clearing agent. In paragraph 30 of the judgment the learned single Judge has referred to this stand taken by the Defendants and then the learned single Judge has observed that the Defendants ultimately conceded that they had appointed M/s.P.G.Modak & Sons as clearing agent. The learned single Judge has reproduced the Power of Attorney dated 23rd July, 1980 executed by the Defendants in favour of their clearing agent. The court in paragraph 55 has also recorded that the bills of lading in respect of consignments were filed and lodged by M/s.P.G.Modak & Sons. The learned single Judge has, therefore, held that the Defendants are not justified in claiming that it was failure and negligence of the Plaintiff, which resulted in loss of the security. The learned single Judge , after discussing the entire relevant evidence on record, has held that the Defendants have failed to discharge the burden placed on them by issue No.15. We see no reason to disturb the finding recorded by the learned single Judge.

7. So far as third submission in relation to rate of interest is concerned, we find that there is substance in that submission. It was pointed out to

us by the learned Counsel appearing for the Appellant that the Plaintiff was also claiming interest at the rate of 15% p.a. In our opinion, therefore, the interest awarded by the learned single Judge on the amount of Rs.25,68,467.90 at the rate of 19.50% p.a. from the date of the suit till the date of realisation is not proper. In our opinion, the decree is liable to be modified to the extent that it awards interest at the rate of 19.50% p.a. In our opinion, awarding of interest at the rate of 15% p.a. in stead of 19.50% would be adequate. The judgment and decree passed by the learned single Judge to that extent is modified.

8. Appeal disposed of. There shall be no order as to costs.

(D.K.Deshmukh, J.)

(J.H.Bhatia, J.)